STANDARD CHARTERED BANK (THAILAND)

v.

DATO' MATSHAH SAFUAN

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: D6-22-3243-1999]
13 FEBRUARY 2003

CIVIL PROCEDURE: *Security - Security for costs - Non-compliance - Payment out of time - Conduct of plaintiff thereof - Whether deemed intentional and contumelious - Whether claim to be struck off - Rules of the High Court 1980, O. 23 r. 2*

The plaintiff bank was ordered by the court to place a deposit of RM30,000 as security for costs on or before 3 September 2001 pursuant to O. 23 r. 2 Rules of the High Court 1980 ('RHC'). A term of the order stated that the deposit must be paid within the prescribed time, failing which the plaintiff's action would be struck out with costs. The plaintiff, in breach of the order, only paid the deposit on 5 September 2001, and henceforth, the defendant applied, albeit unsuccessfully, to strike out the plaintiff's writ and statement of claim under O. 18 r. 19 and O. 92 r. 4 of the RHC. Hence, the appeal herein.

Held (allowing the appeal):

[1] In the light of para (d) of the court's order that the action would stand dismissed if there was failure to place the deposit in time, there was no need for the defendant to invoke O. 18 r. 19 or O. 92 r. 4 of the RHC thereof. Once it is shown that the deposit was made outside the prescribed time, the conduct of the plaintiff is deemed *prima facie* intentional and contumelious and thus the action ought to be struck out. (p 161 c & 162 a)

[1a] The aforesaid notwithstanding, the plaintiff could still persuade the court not to strike out the action by showing that it had no intention to ignore or flout the order and that the failure was due to extraneous circumstances *(Re Jokai Tea Holdings Ltd)*. On the facts, the plaintiff, however, had not discharged this legal burden. (p 162 b)

[2] Even assuming that the sum of RM30,000 was remitted to Standard Chartered Bank, Kuala Lumpur on 29 August 2001, there still was non-compliance with the court's order unless and until the money was actually deposited into the fixed deposit account within the prescribed time. The argument that remitting the money to Standard Chartered Bank, Kuala Lumpur on 29 August was as good as depositing the same in the fixed deposit account is devoid of any merit. (p 163 d)

[3] The plaintiff did not apply for an extension of time despite the fact that the defendant's solicitors had by their letter of 6 September 2001 politely reminded them that the deposit was made out of time. Considering that the plaintiff had ample time to deposit the money, and that, being a bank, it could easily furnish the said sum in a short time, the conduct of the plaintiff, far from negating any intention to flout the order, was clearly intentional and contumelious. (pp 163 h & 164 a-c)

Case(s) referred to:
Re Jokai Tea Holdings Ltd [1983] 1 All ER 630 ***(refd)***
Samuels v. Linzi Dresses Ltd [1980] 1 All ER 803 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)(b), (d), O. 23 rr. 1, 2, O. 92 r. 4

For the plaintiff - N Subramaniam; M/s Lee Swee Seng
For the defendant - TS Wee; M/s David Lingam & Co

Reported by WA Sharif

JUDGMENT

Hishamudin Yunus J:
This is an appeal by the defendant against the decision of the learned senior assistant registrar who had dismissed the defendant's interlocutory application *vide* encl. 18 to have the writ and statement of claim dismissed by reason of non-compliance with an order of the Court dated 3 August 2001.

The plaintiff is a bank registered in Thailand and having its business address in Bangkok. On 18 December 1999 the plaintiff commenced a writ action against the defendant claiming a sum of 448,000. On 20 March 2000 the defendant filed his statement of defence denying owing the plaintiff any money. On 18 April 2001, by way of summons in chambers, the defendant filed an application pursuant to O. 23 r. 1 of the Rules of the High Court seeking security for costs on the ground that the plaintiff is a foreign company. On

3 August 2001 the court pursuant to this application ordered the plaintiff to deposit a sum of RM30,000 into a fixed deposit account as security for costs on or before 3 September 2001. The pertinent portion of the draft order reads:

a) Plaintif yang dinamakan di atas memberi jaminan kos sebanyak RM30,000 ke dalam satu Akaun Simpanan Tetap dalam masa 30 hari dari tarikh keputusan;

b) Satu salinan Sijil Simpanan Tetap dihantar kepada Mahkamah Tinggi dan Defendan;

c) Segala prosiding tindakan ini digantung sehingga jaminan kos di bayar oleh Plaintif;

d) Tindakan ini dibatalkan dengan kos jikalau Plaintif ingkar memberi jaminan kos seperti yang diperintahkan dan dalam masa yang diperintahkan oleh Mahkamah Yang Mulia ini.

Order 23 r. 2 states:

2 Manner of giving security (O. 23 r. 2)

Where an order is made requiring any party to give security for costs, the security shall be given in such manner, at such time, and on such terms (if any), as the Court may direct.

The above order is an 'unless' order.

The money was not paid into the fixed deposit account within 30 days, that is to say, it was not paid into the fixed deposit account on or before 3 September 2001. It was paid into the fixed deposit account at Standard Chartered Bank Kuala Lumpur in the name of the plaintiff's solicitors only on 5 September 2001.

In his application *vide* encl. 18 to strike out the writ and statement of claim, the defendant cites:

(a) Order 18 r. 19(1)(b) and (d);

(b) Order 92 r. 4; and

(c) paragraph (d) of the court's order of 3 August 2001 as set out above, as the basis of his application.

I have allowed the defendant's appeal with costs. I have allowed the appeal on the ground that since there has been a breach of the court's order of 3 August, in particular, para. (a) of that order, prescribing:

a) Plaintif yang dinamakan di atas memberi jaminan kos sebanyak RM30,000 ke dalam satu Akaun Simpanan Tetap dalam masa 30 hari dari tarikh keputusan;

the court is under a duty to give effect to the very same order, namely, para. (d) of the order that stipulates:

d) Tindakan ini dibatalkan dengan kos jikalau Plaintif ingkar memberi jaminan kos seperti yang diperintahkan dan dalam masa yang diperintahkan oleh Mahkamah Yang Mulia ini.

In my judgment, in the light of para. (d) of the court's order of 3 August 2001, for the purpose of the present application, the defendant need not have to invoke either O. 18 r. 19 or O. 92 r. 4 of the Rules of the High Court.

In the present case, it is pertinent to note that that there has been no application for an extension of time by the plaintiff to deposit the security money outside the prescribed time in spite of the fact that it has been pointed out to the plaintiff's solicitors by the defendant's solicitors *vide* their letter of 6 September 2001 that the deposit was made out of time. The defendant's solicitors' letter was simply ignored by the plaintiff.

In *Samuels v. Linzi Dresses Ltd* [1980] 1 All ER 803 Roskill LJ said (at p. 812):

In my judgment, therefore, the law today is that a court has power to extend the time where an 'unless' order has been made but not been complied with; but that it is a power which should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not ignored. Primarily, it is a question for the discretion of the master or the judge in chambers whether the necessary relief should be granted or not.

In *Re Jokai Tea Holdings Ltd* [1983] 1 All ER 630, The English Court of Appeal said (at p. 637):

In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an unless order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But, if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

In my judgment, in the case before me, once it is shown that the deposit was made outside the prescribed time, the conduct of the plaintiff is deemed *prima facie* intentional and contumelious and thus the action ought to be struck out. There is nothing else for the defendant to prove or to satisfy the court. However, on the authority of *Re Jokai Tea Holdings Ltd*, notwithstanding the non-compliance, the plaintiff can still persuade the court not to strike out the action; but the legal burden is on the plaintiff to demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances.

In the present case, has the plaintiff discharged that legal burden? In my judgment, the answer is in the negative.

I find that the plaintiff was not able to give any satisfactory explanation as to why the payment into the fixed deposit account was not made within the prescribed time. There is nothing in the affidavit to show that the failure to obey was due to extraneous circumstances. The plaintiff alleged in its affidavit that the sum of RM30,000 was sent to and received by the Standard Chartered Bank Kuala Lumpur on 29 August 2001, and was paid into the fixed deposit account on the 5 September 2001. Purportedly, as evidence of the remittance of the money on 29 August to the Standard Chartered of Kuala Lumpur, the plaintiff exhibited an e-mail communication dated 29 August between an officer of the plaintiff bank and one Subramaniyan, a solicitor from the firm of solicitors acting for the plaintiff. The e-mail allegedly posted at 9.49am by one Wilampa Jewkaew stated that the RM30,000 had been remitted to the account of "Lee Swee Seng Office Account" at Standard Chartered Kuala Lumpur. The plaintiff, in its affidavit, asserted that once the money was received by Chartered Bank, Kuala Lumpur, on 29 August, it was as good as if the money was deposited into the fixed deposit account, as the act of putting the money into the fixed deposit account was a mere technicality and an internal administrative matter. In the words of the said Subramaniyan, the deponent of the plaintiff's affidavit:

> 5. Saya mengatakan bahawa *prima facie*, Plaintiff telah membayar sekuriti untuk kos sebelum 3-9-2001. Pemindahan dari akaun pejabat ke akaun tetap hanya adalah satu teknikaliti sahaja dan adalah satu prosedur administrative dalaman (internal).

The plaintiff also avers in its affidavit that after it had remitted the money to Standard Chartered Kuala Lumpur on 29 August 2001 it was not able to deposit the money into the fixed deposit account because of the 'Merdeka Day' holiday on Friday 31 August 2001 and the 'long weekend'. I take 'long weekend' to mean that Saturday 1 September 2001 was not a working day but a public holiday. However, the plaintiff has not provided any credible evidence to show that such a remittance was indeed made on 29 August. I am unable to accept the affidavit of the solicitor, Subramaniyan, and the e-mail allegedly received by him as evidence of such a remittance. Why only exhibits an e-mail? Why did only a solicitor affirm the affidavit? If such a remittance was indeed made, all that the plaintiff need to do was simply to file an affidavit affirmed by the relevant officer of Standard Chartered, Kuala Lumpur (or by the relevant officer of Standard Chartered, Bangkok), stating that fact and exhibiting the necessary supporting document. But, in any case, even assuming for the moment that the sum of RM30,000 was remitted to Standard Chartered Kuala Lumpur on 29 August, still there was non-compliance with the court's order unless and until the money was actually deposited into the fixed deposit account within the prescribed time. The argument that remitting the money to Standard Chartered Kuala Lumpur on 29 August was as good as depositing the same in the fixed deposit account is devoid of any merit whatsoever.

Further, on the plaintiff's averment that Friday 31 August was a public holiday and that Saturday 1 September was also a public holiday, if the money was indeed remitted on 29 of August (as claimed by the plaintiff but not accepted by the court), why was the money not deposited into the fixed deposit account on 29 August itself which, according to my official (court's) desk diary, was a Wednesday; or on the next day, 30 August (which was a Thursday); or on Monday, 3 September (since Friday 31 August 2001 and 1 September 2001 were public holidays); or on Tuesday 4 September? Why did the plaintiff waited until 5 September to deposit into the fixed deposit account?

In assessing the plaintiff's above explanation, I have also taken into consideration the following factors.

The first factor is the conduct of the plaintiff. It did not consider it fit to file an application for an extension of time despite the fact that the defendant's solicitors had by their letter of 6 September politely reminded the plaintiff's solicitors that the deposit was made out of time. Nor did the plaintiff's solicitors reply to the letter of the defendant's solicitors. Also in its affidavits, the plaintiff has not apologized to the court for the non-compliance.

Second, the plaintiff had been given ample time to deposit the money into the fixed deposit account. Although it had 30 days to do so, it could have easily deposited the money within (say) 14 days; or within a lesser period. After all, the plaintiff is a bank. Yet, despite the ample time given, the plaintiff chose to carry out the legal obligation imposed by the court only after the expiry of the stipulated period.

Third, considering the fact that the plaintiff is not an ordinary person but a bank, the sum of RM30,000 was relatively only a small sum, and the plaintiff could easily furnish this amount within a short time.

In my judgment, the circumstances of the case as a whole, far from negating any intention to flout the order clearly shows the contrary: that the conduct of the plaintiff was intentional and contumelious.

[Appeal allowed with costs]